STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH KENNY,

Plaintiff-Appellant,

v

KAATZ FUNERAL HOME, INC.,
a Michigan corporation,

Defendant-Appellee.

and

R & I SNOW AND LAWN SERVICE,
a registered assumed name,

Defendant.

FOR PUBLICATION
October 12, 2004
9:10 a.m.

No. 248720
Macomb Circuit Court
LC No. 2002-001898-NO

Official Reported Version

Before: Murphy, P.J., and Griffin and White, JJ.

GRIFFIN, J. (*dissenting*).

In this premises liability action, plaintiff Elizabeth Kenny appeals as of right the circuit court's order granting defendant Kaatz Funeral Home, Inc., summary disposition under MCR 2.116(C)(10). I would affirm and therefore respectfully dissent.

I

On December 27, 2001, plaintiff and four companions drove to defendant Kaatz Funeral Home to attend the funeral of a coworker. It was snowing and they parked their car in defendant's snow-covered parking lot, in a space near the front door of the building. Before getting out of the car into the snowy parking lot, plaintiff observed *three* of her companions holding onto the hood of the car for support. Thereafter, as plaintiff walked around the back of the vehicle toward the passenger side, she slipped and fell. As a result, plaintiff fractured her hip. According to plaintiff, she slipped and fell on clear, "black ice" that was camouflaged by a layer of snow.

Plaintiff filed suit, and defendant moved for summary disposition, arguing that (1) the slippery condition of the parking lot was open and obvious, (2) "special aspects" were not present regarding this snowy and icy parking lot that, in Michigan on December 27, would create "a uniquely high likelihood of harm or severity of harm," and (3) defendant had neither actual nor constructive notice of the allegedly dangerous condition of the parking lot. The trial court granted defendant's motion on all three grounds.

We review de novo a trial court's decision to grant or deny summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002); *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Id.* Summary disposition in favor of the moving party is warranted when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*.; MCR 2.116(C)(10), (G)(4). In presenting a C(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.* The nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Id*. "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id*. at 363.

II

Generally, a premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, this duty does not extend to dangers that are open and obvious, unless special aspects of a condition make even an open and obvious risk unreasonably dangerous, in which case the possessor must take reasonable steps to protect invitees from harm. *Lugo, supra* at 517. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Special aspects are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ." *Lugo, supra* at 519. Neither a common condition nor an avoidable condition is uniquely dangerous. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002).

Citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975), which "reject[ed] the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability," plaintiff contends that the open and obvious doctrine does not preclude an invitor's duty to remove snow and ice. However, subsequent decisions of our Supreme Court and this Court have applied the open and obvious doctrine to

snow and ice cases, see *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002), and *Joyce*, *supra*. Further, in *Corey*, *supra* at 8, this Court noted that the rule in *Quinlivan* has evolved in light of more recent cases:

> [T]here is some suggestion that ice and snowy conditions may constitute an "exception" to the open and obvious danger doctrine. After analyzing both *Lugo* and *Joyce*, we conclude that these prior analyses in *Quinlivan* and *Bertrand* on the interplay between the open and obvious danger doctrine when it involves snow and ice and the newly refined definition of open and obvious in *Lugo* can only mean that the snow and ice analysis in *Quinlivan* is now subsumed in the newly articulated rule set forth in *Lugo*. Specifically, the analysis in *Quinlivan* will now be part of whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious.

Plaintiff nonetheless argues that the open and obvious doctrine does not apply to the present circumstances because the black ice took on the color of the asphalt pavement beneath it and was not easily visible on casual inspection, the ice was virtually undetectable in the evening darkness, and the ice was hidden and camouflaged by a layer of snow. I disagree for the reasons articulated by the trial court in its well-written opinion granting summary disposition to defendant:

> The evidence shows that on the date in question, Kenny and several others had traveled to Kaatz's premises for the purpose of paying their respects to a deceased co-worker. The funeral home was approximately 40 miles from Kenny's home, where she was picked up by the driver, Marge Contesti ("Contesti"). Kenny observed that it started to snow on the way to their destination. They arrived at the funeral home at 6:30 P.M. or 6:45 P.M., at which time it was dark outside. Contesti parked in the only available space in the lot. The snow in the lot "wasn't real bad;" instead, it was merely "a dusting on the road."
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> Kenny exited the vehicle last. Two of the others were on the entrance steps at the time that Kenny fell. She was alongside the back of the car when her accident occurred. Further, she fell in a driveway, rather than in the parking space.
>
> Kenny indicated that the snow was at least an inch deep at the time of her accident. She described the weather as "just a few flakes in the air" rather than a snowstorm. Kenny was walking beside Contesti when both of her feet went up into the air, and she fell on her right hip. Contesti also slipped. Kenny did not see any of her other friends fall; however, she noticed that they "hung onto the car" when they exited the vehicle. She did not know if she had been looking at the ground just prior to her accident.
>
> Kenny did not see the ice until she fell because it was covered by snow. In this regard, she described the condition as "black ice," the color of the

> pavement. She did not know how thick the ice was or how long it had been in that area. Moreover, she did not know how long it had been snowing. It did not appear that the snow had been plowed or that anyone had thrown salt on the ice. Seventy-nine-year-old Kenny had lived in Michigan all of her life and had witnessed many snowfalls.
>
> Contrary to Kenny's assertion, the Court finds that the "open and obvious" doctrine applies to the instant case. *See, e.g., Perkoviq, supra; Joyce, supra*. The Court further determines that the alleged hazard had been "open and obvious" to an individual of average intelligence. . . . Kenny acknowledged that, before she exited the vehicle, she had observed the others hang onto it for support. That alone should have clued her into the possible danger that awaited her outside the vehicle. She also conceded that it had been snowing outside. As a lifelong resident of Michigan, she should have been aware that ice frequently forms beneath snow during snowy December nights. In any event, she could not even recall whether she had been watching where she was walking. The Court points out that Kaatz was not an absolute insurer of Kenny's safety. *Bertrand, supra*. [Citations for depositions deleted.]

Under these facts, the trial court correctly ruled that reasonable minds could not differ that the slippery condition of the parking lot was open and obvious. *Novotney, supra; Corey, supra;* and *Joyce, supra*.

On this issue, I note that the focus of the majority is on the plaintiff's *subjective* knowledge of the condition,[1] rather than "whether 'an *average user* [an objective standard] with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce, supra* at 238, quoting *Novotney, supra* at 475. In my view, after witnessing three companions exit a vehicle into the snow-covered parking lot on December 27 and seeing them holding on to the hood of the car to keep their balance, all reasonable Michigan winter residents would conclude that the snow-covered parking lot was slippery.

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[1] The majority reasons as follows:

> Here, although plaintiff did observe a light dusting of snow, she testified that she did not see the ice that was covered by the snow and that allegedly caused her fall. Considering that "black ice" coated the area, it is questionable that the ice would be observable even without the snow covering it. There was no testimony that plaintiff knew that the lot was sheeted with ice before she walked from the car toward the funeral home. Plaintiff never told anyone that the lot was slippery, nor had she slipped in the lot before the fall like the plaintiff in *Joyce*. There was also no evidence that plaintiff felt the presence of ice before falling. [*Ante* at ___.]

In n 3 of its opinion, the majority also states:

> With respect to plaintiff's companions holding the car as they maneuvered toward the funeral home, we find that the evidence is subject to reasonable interpretations other than solely the one surmised by the trial court. There are numerous reasons someone may have been holding on to the car, including age and general difficulty walking. Although not entirely clear from the record, it appears that plaintiff's four companions were elderly women of ages comparable to plaintiff's. We also note that plaintiff did not specifically testify that she recognized that her companions were holding the car because of ice on the lot. Further, plaintiff's testimony makes clear that her three other companions, who "hung on to the hood and walked up to the funeral home" walked "alongside of the car and they went out the front way" while plaintiff and the driver, who also fell, walked around the back of the car to avoid walking between the cars. [*Ante* at ___.]

The majority speculates that in the snow-covered parking lot "there are numerous reasons" all three of plaintiff's companions may have been holding on to the hood of the car for support. However, plaintiff offered no evidentiary support, through an affidavit or other documentary evidence, to rebut the reasonable inference that the slippery condition of the snow-covered parking lot caused the women to grasp the car for support. In opposing defendant's motion for summary disposition based on MCR 2.116(C)(10), plaintiff failed to offer admissible evidence supporting the speculation made by the majority. As our Supreme Court held in *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999):

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.

III

Finally, plaintiff has presented no evidence of the alleged "special aspects" of the snow-covered and icy parking lot that created "a uniquely high likelihood of harm or severity of harm . . . . " *Lugo, supra* at 518-519; *Joyce, supra* at 242-243. Previously, this Court held that a layer of snow on a sidewalk did not constitute a unique danger creating a "risk of death or severe injury," *Joyce, supra* at 243, and that falling down ice-coated stairs likewise does not give rise to the type of severe harm contemplated in *Lugo*. *Corey, supra* at 6-7. Snow and ice in a Michigan parking lot on December 27 are a common, not unique, occurrence. Under the *Lugo, supra* at 518-519, definition of "special aspects," ice and snow do not present "a *uniquely high* likelihood of harm or severity of harm." (Emphasis added.) *Joyce, supra* at 241-243.

Plaintiff also argues that the allegedly icy condition was unavoidable because only one parking space in the lot was vacant when she and her companions arrived at the funeral home, and also because she was a passenger in the car and thus had no control over the parking of the

car. However, these circumstances do not rise to the level of making her encounter with the allegedly icy condition "effectively unavoidable" such that it constituted an unreasonable risk of harm. See *Lugo, supra* at 518-519. Moreover, as the trial court noted, "[A] reasonable person would have been alerted to the possibility that it was slippery outside when she witnessed her friends support themselves on the vehicle as they exited [it]." Thus, plaintiff 's argument that the slippery parking lot presented "special aspects" is without merit because the condition was both common and avoidable. *Corey, supra*.

I respectfully dissent and would affirm.[2]

/s/ Richard Allen Griffin

[2] I would find resolution of the final question (whether defendant had actual or constructive knowledge of the condition) unnecessary in view of the disposition of the first two issues.